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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NIAGARA HUDSON POWER CORPORATION
and
SECURITIES AND EXCHANGE COMMISSION,
Petitioners,

v.

M. VICTOR LEVENTRITT,
Respondent.

No. 211
212

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Question Presented.

Did the U. S. Court of Appeals for the Second Circuit err in holding that there was no evidence to support the finding of the Securities and Exchange Commission that these option warrants were wholly worthless?

Reasons for Denying the Writ.

1. On its face, the Court below determined only that the Niagara Hudson option warrants were entitled to the same protection as other securities and that where a continuous market history over a period of twenty years shows value, and where nothing in the record supports a finding of no value, the Commission cannot wipe out a class of securities without compensation. Such a determination is in no conflict with the decisions of this or any other Court. What the petitions amount to essentially is a contention that the Court below erred in finding no evidence. That, however, is not a sufficient reason for granting certiorari, especially since petitioner does not claim that the Second Circuit has exceeded the scope of review permitted to the courts in appeals from administrative decisions.

2. The SEC asks for certiorari on the ground that the opinion of the Court below rejects "traditional valuation techniques" and requires the Commission "to disregard its own best judgment and to accept in lieu thereof market quotations as the determinant of value".

This argument does not do justice to the opinion of Learned Hand, *C. J.* While the Court below carefully refrains from suggesting what value the Commission should find, any implication that the standards applied in previous reorganizations would not be accepted is completely unwarranted. There can be no doubt, for instance, that adoption of the approach approved in *In Re Electric Power and Light Corporation*, 176 F. (2d), 687, 691 (CA 2d 1949) cert. denied, would fully meet the requirements of the Court of Appeals.

3. The Court below necessarily rejected the fantastic notion advanced by the SEC that a perpetual option warrant is worthless unless the Commission finds it "reasonably probable" that the stock will surpass the option price "within the foreseeable future". It was this proposition, supported neither by reason nor by authority, which the Court below refused to swallow as a substitute for evidence. That Court, although it noted their conservatism, did not take exception to the earnings forecast on which the Commission based a finding that the *common stock* of Niagara was presently worth about its market price. It rejected the *non sequitur* that *therefore* a perpetual option to buy it at three times *present* value was *necessarily worthless.*

The Court of Appeals, reviewing the market history of these option warrants, found that their price always represented a significant fraction of the price of the common stock—that while that fraction varied, the variations were such as might reasonably and logically be expected, reflecting an economic law governing the price relationships. The SEC cannot arbitrarily select standards of value, rejecting those which are customarily applied by well-informed investors. On the contrary, in considering past and estimated future earnings, probable ability to pay dividends, and normal prevailing yields and capitalization factors, it should place itself, as required by this Court, in the position of an intelligent investor and should apply the same tests he would use. But this investor, in appraising perpetual option warrants to buy stock at substantially above the current market, does not consider only those factors which determine the value of securities which are bought primarily for yield. The value of such a warrant is, as Judge Learned Hand said (at page 727) "the result of a willingness to pay cash for the chance that the market's judgment as to the future of the property may be too unfavorable". Such warrants are often bought as a "hedge" by extremely conservative investors in times, like the present, when

inflation threatens the real value of their large holdings of bonds and other fixed dollar value securities.

While showing all due respect for the SEC's findings of economic fact, the Court below did not endorse the Commission's assumed prerogative of writing new economic law. The mandate simply requires the SEC to do its job as an appraiser—to determine what a willing buyer would pay a willing seller for the rights embodied in these option warrants if the Act had not intervened to cut them off.

4. The SEC's petition for certiorari shows such a complete misunderstanding of its functions in this case and of the opinion below as to cast grave doubt on its ability properly to carry out the mandate of the Court of Appeals. (See p. 10 of the SEC's petition for rehearing below, p. 150 of the printed record here). An opinion by this Court may be needed to clarify the questions troubling the Commission, which may otherwise render abortive the further proceedings which are now required. This Court may accordingly wish to grant the writ in order to anticipate the questions which almost certainly will be presented at a later stage in the proceedings.

We recognize, however, that this Court may well view the matter as premature for review, particularly since the SEC did not, as Clark, *J.* pointed out in his separate concurring opinion, give any consideration at all to market value which is obviously pertinent, whether or not decisive. Should this be the case, it appears that no question has been raised which necessitates present consideration by this Court.

Respondent therefore prays that the petitions for certiorari be denied.

Respectfully submitted,

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M. Victor Leventritt,

Attorneys for Respondent.